

Before the
Administrative Hearing Commission
State of Missouri



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APR 17 2008

MO. ATTORNEY GENERAL

ALLIANCE WHOLESALE,

Petitioner,

vs.

MISSOURI BOARD OF PHARMACY,

Respondent.

No. 06-1683 PH

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APR 21 2008

MISSOURI BOARD
OF PHARMACY

CONSENT ORDER

The applicant for licensure filed a complaint. Section 621.120, RSMo 2000, gives us jurisdiction.

On April 15, 2008, the parties filed a "Joint Motion for Consent Order, Joint Stipulation of Facts and Conclusions of Law, and Waiver of Hearing Before the Administrative Hearing Commission." Our review of the document shows that the parties have stipulated to certain facts and waived their right to a hearing before us. Because the parties have agreed to these facts, we incorporate them into this order and adopt them as stipulated. *Buckner v. Buckner*, 912 S.W.2d 65,70 (Mo. App., W.D. 1995). We conclude that these facts would be cause for discipline under § 338.055.2(5), (6) and (15), RSMo 2000, and thus are cause to deny the license under § 338.055.1, RSMo 2000. We conclude that these facts would not be cause to deny the license under §§ 338.055.2(10) and 338.055.1. We incorporate the parties' proposed findings of fact and our revised conclusions of law into this Consent Order. The parties agree to the issuance of a probated license.

No statute authorizes us to determine whether the agency has complied with the provisions of § 621.045.3. This is consistent with the holding that we have no role in superintending agency compliance with statutory procedures. *Missouri Health Facilities Review Comm. v. Administrative Hearing Comm'n*, 700 S.W.2d 445, 450 (Mo. banc 1985). Therefore, we do not determine whether the agency complied with such procedures.

SO ORDERED on April 16, 2008.

JOHN J. KOPP
Commissioner

A handwritten signature in black ink, appearing to read "John J. Kopp", written over a horizontal line.

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

PHIL AND KATHY'S, INC.,)
d/b/a ALLIANCE WHOLESALE DISTRIBUTORS,)

Petitioner,)

v.)

MISSOURI BOARD OF PHARMACY,)

Respondent.)

No. 06-1683 PH

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APR 21 2008

MISSOURI BOARD
OF PHARMACY

JOINT MOTION FOR CONSENT ORDER,
JOINT STIPULATION OF FACTS AND CONCLUSIONS OF LAW,
AND WAIVER OF HEARING BEFORE THE
ADMINISTRATIVE HEARING COMMISSION

Petitioner Phil and Kathy's, Inc., d/b/a Alliance Wholesale Distributors ("Applicant") and Respondent Missouri Board of Pharmacy ("Board") enter into this *Joint Motion for Consent Order, Joint Stipulation of Facts and Conclusions of Law, and Waiver of Hearing Before the Administrative Hearing Commission* ("Joint Stipulation") for the purpose of resolving the question of whether Applicant should receive a Missouri license as a drug distributor. Pursuant to the rules governing practice and procedure before the Administrative Hearing Commission ("Commission"), 1 CSR 15-3.440(3), and pursuant to the terms of § 536.060, RSMo,¹ as it is made applicable to the Commission by § 621.135, RSMo, the

¹ All statutory references are to the Revised Statutes of Missouri 2000, as amended, unless specifically stated otherwise.

FILED

APR 15 2008

ADMINISTRATIVE HEARING
COMMISSION

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parties move for a consent order by the Commission and waive the right to a hearing and decision in the above-styled case.

I. JOINT STIPULATION

Based upon the foregoing, the Board and Applicant jointly stipulate to the following findings of fact and conclusions of law in lieu of the facts and conclusions of law as alleged in the Complaint and Answer filed in this case, and request that the Commission adopt the Joint Proposed Findings of Fact and Conclusions of Law as the Commission's Findings of Fact and Conclusions of Law.

JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Board, is an agency of the State of Missouri created and established by § 338.110, RSMo, for the purpose of administering and enforcing the provisions of Chapter 338, RSMo.
2. Applicant used to have a drug distributor license, no. 2001012008, which expired on October 31, 2005.
3. After Applicant's drug distributor license expired, Applicant continued to ship legend products into Missouri until July 21, 2006.
4. The Board sent Applicant a cease and desist letter on July 20, 2006, informing Applicant that it must immediately stop shipping legend products into Missouri without a license.
5. Upon receipt of the cease and desist letter, Applicant stopped shipping legend products into Missouri.

6. Applicant subsequently submitted an application to the Board for a drug distributor license.

7. The Board denied Applicant a new drug distributor license based on Applicant's conduct of shipping legend product into Missouri without a license.

8. For shipping legend products into Missouri with an expired license, the Board rightfully denied Applicant a license under §§ 338.055.1 and 338.055.2(5), (6), (10), and (15), RSMo.

9. Applicant timely appealed the Board's denial of a drug distributor license.

10. Jurisdiction and venue are proper before the Administrative Hearing Commission pursuant to § 621.045, RSMo, and § 327.441, RSMo.

11. Section 338.333, RSMo, provides, in pertinent part:

1. No person or distribution outlet shall act as a wholesale drug distributor or pharmacy distributor without first obtaining license to do so from the Missouri board of pharmacy and paying the required fee. The board may grant temporary licenses when the wholesale drug distributor or pharmacy distributor first applies for a license to operate within the state. Temporary licenses shall remain valid until such time as the board shall find that the applicant meets or fails to meet the requirements for regular licensure. No license shall be issued or renewed for a wholesale drug distributor or pharmacy distributor to operate unless the same shall be operated in a manner prescribed by law and according to the rules and regulations promulgated by the board of pharmacy with respect thereto. Separate licenses shall be required for each distribution site owned or operated by a wholesale drug distributor or pharmacy distributor.

12. Section 338.055, RSMo, provides, in pertinent part:

1. The board may refuse to issue any certificate of registration or authority, permit or license required pursuant to this chapter for one or any combination of causes stated in subsection 2 of this section. The board shall notify the applicant in writing of the reasons for the refusal and shall advise the applicant of his or her right to file a complaint with the administrative hearing commission as provided by chapter 621, RSMo.

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

* * *

(5) Incompetence [or] gross negligence . . . in the performance of the functions or duties of any profession licensed or regulated by this chapter;

(6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;

* * *

(10) Assisting or enabling any person to practice or offer to practice any profession licensed or regulated by this chapter who is not registered and currently eligible to practice under this chapter;

* * *

(15) Violation of the drug laws or rules and regulations of this state, any other state or the federal government[.]

II. JOINTLY AGREED ORDER

1. Based upon the foregoing, the parties mutually agree and stipulate that the following shall constitute the order entered by the Board in this matter under the authority of §§ 327.441, 536.060, and 621.110, RSMo and § 621.045.3, RSMo, as amended. This order will be effective immediately upon the issuance of the consent order of the Commission without further action by any party.

2. **APPLICANT WILL RECEIVE A PROBATED LICENSE.** The Board will issue Applicant a PROBATED drug distributor license, which will be on probation for a period of THREE YEARS. The period of probation is referred to hereinafter as "the probationary period." During the probationary period, Applicant shall be entitled to practice as a drug distributor provided it pays all required fees, has maintained its license current and active, and adheres to all the following terms:

- a. During the probationary period, Applicant shall pay all required fees for licensing to the Board and shall renew its license prior to October 31 of each licensing year.
- b. Applicant shall comply with all provisions of Chapters 338 and 195, RSMo, as amended; all applicable federal and state drug laws, rules, and regulations; and all federal and state criminal laws. "State" here includes the State of Missouri and all other states and territories of the United States.

c. If, after disciplinary sanctions have been imposed, Applicant fails to keep its Missouri license current, the period of unlicensed status shall not be deemed or taken as any part of the period of discipline do imposed.

3. Upon the expiration of the disciplinary period, the Board shall issue Applicant a full drug distributor license, if all requirements of law have been satisfied; provided, however, that in the event the Board determines that Applicant has violated any term or condition of this Joint Stipulation, the Board may, in its discretion, vacate and set aside the discipline imposed herein and impose such further discipline as it shall deem appropriate.

4. No additional discipline shall be imposed by the Board pursuant to the preceding paragraph of this Joint Stipulation without notice and opportunity for hearing before the Board as a contested case in accordance with the provisions of Chapter 536, RSMo. If any alleged violation of this Joint Stipulation occurred during the disciplinary period, the Board may choose to conduct a hearing before it to determine whether a violation occurred and may impose further discipline.

5. This Joint Stipulation does not bind the Board or restrict the remedies available to it concerning any violations by Applicant of Chapter 338, RSMo, as amended, or the regulations promulgated thereunder, or of the terms and conditions of this Joint Stipulation.

6. This Joint Stipulation does not bind the Board or restrict the remedies available to it concerning facts or conduct not specifically mentioned in this Joint Stipulation that are either now known to the Board or may be discovered.

7. If any alleged violation of this Joint Stipulation occurred during the disciplinary period, the parties agree that the Board may choose to conduct a hearing before it either during the disciplinary period, or as soon thereafter as a hearing can be held, to determine whether a violation occurred and, if so, may impose further disciplinary action. Applicant agrees and stipulates that the Board has continuing jurisdiction to hold a hearing to determine if a violation of this Joint Stipulation has occurred.

8. Each party agrees to pay all its own fees and expenses incurred as a result of this case, its litigation, and/or its settlement.

9. The terms of this Joint Stipulation are contractual, legally enforceable, and binding, not merely recital. Except as otherwise contained herein, neither this Joint Stipulation nor any of its provisions may be changed, waived, discharged, or terminated, except by an instrument in writing signed by the party against whom the enforcement of the change, waiver, discharge, or termination is sought.

10. The parties to this Joint Stipulation understand that the Board will maintain this Joint Stipulation as an open record as required by Chapters 338, 610, and 620, RSMo, as amended.

11. Applicant, together with its heirs, assigns, agents, partners, employees, representatives and attorneys, does hereby waive, release, acquit and

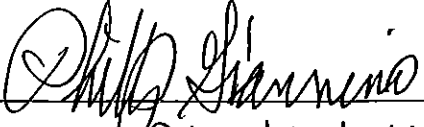
forever discharge the Board, its respective members, employees, agents and attorneys including former members, employees, agents and attorneys, of, or from any liability, claim, actions, causes of action, fees, costs, expenses and compensation, including, but not limited to, any claim for attorney's fees and expenses, whether or not known or contemplated, including, but not limited to, any claims pursuant to § 536.087, RSMo, as amended, or any claim arising under 42 U.S.C. § 1983, which now or in the future may be based upon, arise out of, or relate to any of the matters raised in this case or its litigation, or from the negotiation or execution of this Joint Stipulation. The parties acknowledge that this paragraph is severable from the remaining portions of the Joint Stipulation in that it survives in perpetuity even in the event that any court of law or administrative tribunal deems this agreement or any portion thereof void or unenforceable.

III. CONCLUSION

In consideration of the foregoing, the parties consent to the entry of record and approval of this Joint Stipulation and to the termination of any further proceedings before the Commission based upon the complaint filed by the Board in the above-captioned cause.

RESPONDENT

Phil & Kathy's, Inc.,
d/b/a Alliance Wholesale Distributors

By: 
Printed name: PHILLIP GIANNINO

Title: PRESIDENT

Date: 4/3/2008

BLITZ, BARDGETT & DEUTCH, LLC
Attorneys at Law



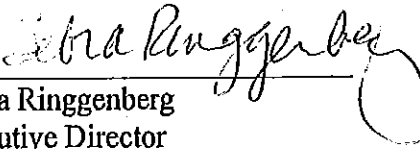
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Missouri Board of Pharmacy

By: 
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Executive Director

Date: 4-15-08

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